



Billing Code: 8025-01

## SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, and 127

RIN: 3245-AG23

Small Business Size and Status Integrity

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: This rule implements provisions of the Small Business Jobs Act of 2010 (Jobs Act) pertaining to small business size and status integrity. This rule amends the U.S. Small Business Administration's (SBA or Agency) program regulations to implement statutory provisions establishing that there a presumption of loss equal to the value of the contract or other instrument when a concern willfully seeks and receives an award by misrepresentation. The rule implements statutory provisions that provide that: The submission of an offer or application for an award intended for small business concerns will be deemed a size or status certification or representation in certain circumstances; an authorized official must sign in connection with a size or status certification or representation for a contract or other instrument; and concerns that fail to update their size or status in the Online Representations and Certifications Application (ORCA) database or a successor thereto (such as the System for Award Management (SAM) database) at least annually shall no longer be identified in the database as small or some other socioeconomic status, until the representation is updated. The rule also amends SBA's regulations to clarify when size is determined for purposes of entry into

the 8(a) Business Development, HUBZone and Small Disadvantaged Business (SDB) programs.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: On September 27, 2010, Congress amended the Small Business Act to provide that if a concern willfully seeks and receives an award by misrepresenting its small business size or status, there is a presumption of loss to the United States equal to the value of the contract, subcontract, cooperative agreement, cooperative research and development agreement or grant. The Small Business Act was also amended to provide that certain actions, such as submitting an offer in response to a solicitation set aside for small business concerns, will be deemed a representation of small business size or status. The Small Business Act was amended to provide that the signature of an authorized official of a concern is required in making a small business size or status representation in connection with certain actions, such as submitting an offer. The Small Business Act now provides that concerns must update their size and status certifications in SAM at least annually, or the status will be lost until such time as the update is made. Finally, the Small Business Act provides that SBA must promulgate regulations to protect individuals and concerns from liability in cases of unintentional errors, technical malfunctions and other similar situations.

SBA published a proposed rule regarding these statutory provisions in the Federal Register on October 7, 2011 (76 FR 62313), inviting the public to submit comments on or before November 7, 2011. This comment period was extended through December 8, 2011 by notice in the Federal Register published on November 8, 2011 (76 FR 69154).

#### Summary of Comments and SBA's Responses

SBA received and considered twenty comments on the proposed rule. Two commenters fully supported the rule as proposed. One comment addressed the proposed Small Business Subcontracting Rule published at 76 FR 61626 on October 5, 2011. This comment was outside the scope of this proposed rulemaking and was not considered in adopting this final rule. The remaining comments, as well as SBA's response to them, are discussed below.

#### Presumption of Loss

SBA received several comments regarding SBA's proposal that the presumption of loss to the United States for a willful misrepresentation of size or status be irrefutable. 13 CFR §§ 121.108(a), 121.411(d), 124.521(a), 124.1015(a), 125.29(a), 126.900(a), and 127.700(a). As noted in the proposed rule, SBA based its proposed imposition of an irrefutable presumption of loss on Senate Report language indicating that the presumption shall be "irrefutable." Senate Rep. No. 111-343, p. 8, available at: <http://www.gpo.gov>.

One commenter suggested that SBA eliminate "irrefutable" from the regulatory text. This commenter stressed that: (1) irrefutable presumptions deny due process of law; and (2) Senate Report language does not possess statutory authority. Another commenter argued that the cited Senate Report was not the Senate Report for the legislation in

question, but was instead a Senate Report for a prior piece of proposed legislation. Upon additional reflection, SBA has decided to remove the term “irrefutable” from the regulations, rendering the presumption rebuttable. SBA notes that the presumption of loss provisions will be utilized in civil and criminal Federal court proceedings, where due process will be provided. Further, SBA’s regulations limit liability in the case of unintentional error, technical malfunction, or other similar situations. 13 CFR §§ 121.108(d), 121.411(g), 124.521(d), 124.1015(d), 125.29(d), 126.900(d), and 127.700(d). As such, an “irrefutable” presumption would be inappropriate in these instances.

Another commenter suggested that SBA ensure firms have sufficient due process to contest a finding of willful misrepresentation before penalties are imposed. This commenter made several suggestions as to how SBA could ensure protection of business concerns’ due process – these suggestions included: (1) provision of an agency level response period; and (2) empowering SBA’s Office of Hearings and Appeals (OHA) to hear appeals of determinations under the proposed rule. As discussed above, the statutory presumption of loss provisions will be applied in Federal civil and criminal court proceedings where due process will be provided and as explained above, in certain instances, SBA’s regulations limit liability. 13 CFR §§ 121.108(d), 121.411(g), 124.521(d), 124.1015(d), 125.29(d), 126.900(d), and 127.700(d). As such, SBA does not believe that this provision requires modification.

One commenter suggested that SBA impose a rebuttable presumption where a size determination finds that a firm is small by itself (i.e., absent the firm’s affiliates) that the firm did not willfully misrepresent its size. Likewise, this commenter suggested that SBA impose a rebuttable presumption that the firm willfully misrepresented its size when

a size determination finds the firm to be other than small by itself (i.e., absent the firm's affiliates). As discussed above, the rule now provides that the presumption is rebuttable. The question of whether a firm has willfully misrepresented its size is a factual determination best made by a judge, jury, or other decider of fact. Given the fact-specific nature of such a finding, SBA declines to impose a presumption as to an actor's intent.

Two commenters suggested clarification of the language in proposed 13 CFR §§ 121.108(a), 121.411(d), 124.521(a), 124.1015(a), 125.29(a), 126.900(a), and 127.700(a) which provide that the presumption of loss applies "whenever it is established" that a firm willfully misrepresented its status. Specifically, the commenters requested clarification of who makes the finding of willful misrepresentation, how a firm is notified of such a finding, whether the determination is appealable, and how a company may defend its representation. Consistent with the intent of the Jobs Act, it is SBA's intent that the presumption of loss shall be applied in all manner of criminal, civil, administrative, contractual, common law, or other actions, which the United States government may take to redress willful misrepresentation. As such, the finder of fact, notice requirements, and means of defense must depend on the specific action taken against a business concern. SBA does not believe any changes to the proposed rule or other clarification would be appropriate and adopts the proposed provisions as final in this rule.

Another commenter requested clarification as to whether an adverse size determination automatically leads to a presumption that the relevant firm willfully misrepresented its size. SBA recognizes that an unsophisticated firm or one new to the Federal government arena may certify its status as a small business in good faith, but may

ultimately be found to be other than small. Similarly, a firm may incorrectly apply an ownership or control requirement for the service-disabled veteran-owned (SDVO) or women-owned small business (WOSB) programs in good faith, and ultimately be found not to qualify as a SDVO or WOSB small business. In either case, if the situation truly is a good faith misinterpretation of SBA's rules, SBA does not believe that action should be taken against the firm or its principals. Again, the question of whether a firm submitted a misrepresentation in good faith or intentionally (or recklessly) submitted a false size or status representation or certification is a factual determination best made by a judge, jury, or other decider of fact.

One commenter recommended that SBA amend the proposed rule to include a provision requiring the government to "prominently mark" any solicitation set aside as contemplated by the proposed rule. Currently, solicitations issued under the Federal Acquisition Regulation (FAR) must contain specific clauses providing notice regarding set-asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and other mechanisms which somehow classify a solicitation as intended for award to specific entities. 48 CFR §§ 52.219-3, 52.219-4, 52.219-6, 52.219-7, 52.219-13, 52.219-18, 52.219-23, 52.219-27, 52.219-29, and 52.219-30. Therefore, SBA does not believe any change to the rule is necessary.

One commenter requested clarification of situations where an offer may be "otherwise classified as intended for award to small business" without being specifically identified as set aside for small business. Consistent with the underlying statutory text, it is SBA's intent that the rule be broadly inclusive of set-asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and any other mechanisms which

are not specifically addressed by the FAR. SBA does not feel that additional clarification is necessary and has adopted the proposed rule as final.

#### Deemed Certifications

One commenter expressed concern that proposed §§ 121.108(b)(2), 121.411(e)(2), 124.521(b)(2), 124.1015(b)(2), 125.29(b)(2), 126.900(b)(2), and 127.700(b)(2) are too broad and could permit attenuated acts or omissions to give rise to a deemed certification. SBA disagrees. Federal agencies are statutorily required to establish goals for the participation of small business concerns, SDVO small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and WOSB concerns. 15 U.S.C. § 644(g). At the conclusion of each fiscal year, Federal agencies must compile reports as to the agencies' performance in attaining their contracting goals. 15 U.S.C. § 644(h). It is SBA's intention that §§ 121.108(b)(2), 121.411(e)(2), 124.521(b)(2), 124.1015(b)(2), 125.29(b)(2), 126.900(b)(2), and 127.700(b)(2) shall be applied in cases where a specific offer encourages the procuring agency to classify the award as an award to a small business or other concern for the purposes of the agencies' contracting goals. Under 48 CFR § 4.1201, a Federal agency shall rely on a business concern's ORCA representations and certifications in determining how to classify the award. Accordingly, in most cases, it will be a firm's ORCA/SAM representations and certifications which would encourage a Federal agency to classify an award as having gone to a small business. Therefore, SBA believes that in practice, proposed §§ 121.108(b)(2), 121.411(e)(2), 124.521(b)(2), 124.1015(b)(2), 125.29(b)(2), 126.900(b)(2), and 127.700(b)(2) have a narrow application and the provisions have been adopted as final in this rule.

Another commenter recommended that SBA eliminate proposed §§ 121.108(b)(3), 121.411(e)(3), 124.521(b)(3), 124.1015(b)(3), 125.29(b)(3), 126.900(b)(3), and 127.700(b)(3), which provide that registration on any Federal electronic database for the purpose of being considered for award shall be deemed an affirmative, willful, and intentional certification as to the relevant concern's small business size and status. This is a statutory requirement that SBA cannot eliminate. The Jobs Act specifically deems registration on a Federal electronic database as a willful certification as to size and status. 15 U.S.C. § 632(w)(2)(C). As such, SBA is precluded by statute from eliminating these provisions and they remain in this final rule.

#### Signature Requirement

SBA received two comments regarding proposed §§ 121.108(c), 121.411(f), 124.521(c), 124.1015(c), 125.29(c), 126.900(c), 127.700(c), which require an authorized official to sign the small business size and status certification page of any solicitation, bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved for small business concerns. The first commenter suggested that the rule specifically give electronic signatures the same effect as wet signatures. For the purpose of Government contracts, such a provision already exists at 48 CFR § 4.502(d) which provides that agencies may accept electronic signatures and records. However, SBA lacks the statutory authority to enact such a rule and has not adopted this comment.

The second commenter questioned whether the signature requirement is superfluous given that a signature on an offer is meant to certify all the offer's contents. SBA considered this comment, but has adopted the proposed provisions as final in this



rule. The Jobs Act specifically requires that a certification as to a firm's small business size or other status shall contain the signature of an authorized official on the same page as the certification. 15 U.S.C. § 632(w)(3)(B). As such, SBA is precluded by statute from eliminating the signature requirement. Further, the Federal Acquisition Council will implement the signature requirement in the Federal Acquisition Regulation and associated clauses. SBA has made minor wording changes in these provisions for clarity. The word "solicitation" has been replaced by the words "offer" and "proposal" to clarify that it is the offer that a contractor is signing, not the solicitation.

#### Limitation of Liability

Two commenters suggested that SBA amend proposed §§ 121.108(d), 121.411(g), 124.521(d), 124.1015(d), 125.29(d), 126.900(d), and 127.700(d) to adopt the statutory language which protects firms from liability where misrepresentation was the result of "unintentional errors, technical malfunctions, or other similar situations." SBA feels that the addition of "or other situations" more accurately captures the breadth of situations in which liability is to be limited and has therefore adopted this comment in the final rule.

Two commenters suggested that SBA clarify the standard of care required in making representations. Under proposed §§ 121.108(a), 121.411(d), 124.521(a), 124.1015(a), 125.29(a), 126.900(a), and 127.700(a), the presumption of loss applies only where a firm willfully misrepresents its small business size or other status. Sections 121.108(d), 121.411(g), 124.521(d), 124.1015(d), 125.29(d), 126.900(d), and 127.700(d) further provide that misrepresentations which are the result of "unintentional errors, technical malfunctions, or other similar situations" are not considered to be willful. In

addition, the statute and implementing regulations provide that certain actions are deemed to be willful and require an official to sign on the same page as size or status representation. As discussed above, whether a representation is willful or should result in liability or criminal penalty is a fact-based decision that will be made by a judge, jury or other decider of fact. SBA has made minor wording changes in the limitation of liability provisions to make clear that the question of whether a misrepresentation is willful is a fact-based decision that will be made, not by SBA, but by a judge, jury or other decider of fact. To clarify that the limitation of liability provisions convey discretion to the finder of fact, the phrase “shall not apply” has been amended as “may be determined not to apply.” Further, the phrase “consideration shall be given to” has been changed to “relevant factors to consider in making this determination may include.”

One commenter asked if SBA would agree that thirty days is a reasonable amount of time in which to correct an erroneous representation. It is SBA’s view that the question of whether an erroneous representation was corrected in a timely manner is dependent on the facts of a given case. SBA believes such a determination is best made by a judge, jury, or other decider of fact.

Two commenters suggested that business concerns be protected from liability when their misrepresentation resulted from ambiguity in SBA’s regulations. As discussed above, SBA believes that a good faith misinterpretation of SBA’s rules should not be considered a willful misrepresentation of size or status. Whether a regulation is ambiguous and whether a misinterpretation is reasonable and made in good faith is a fact-specific determination that will be made by a judge, jury, or other decider of fact.

Two commenters suggested that the list of mitigating factors set forth in the

proposed rule be clarified and expanded. It is not SBA's intent that the list of mitigating factors included in the proposed rule be exhaustive. Again, the question of whether a firm willfully misrepresented its size or status is a factual determination best made by a judge, jury, or other decider of fact. SBA does not believe any additional changes or clarification is warranted.

#### Annual Recertification

One commenter argued that annual recertification is too burdensome. SBA disagrees. This rule does not impose new reporting requirements – concerns must certify their size and status annually in order to be identified as a small business or other socioeconomic concern in ORCA under existing regulations. 48 CFR § 4.1201(b). Moreover, annual certification of size and status is statutorily required. 15 U.S.C. § 632(x). In addition, a firm is expected to verify its representation in SAM every time it submits an offer on a government contract. SBA has, however, identified SAM as the current successor to ORCA and has amended all references to ORCA in the proposed rule to instead reference SAM. As such, SBA adopts the annual SAM verification requirement in this final rule.

Two commenters recommended that firms awarded contracts longer than five years be required to recertify only on the fifth year. SBA considered this comment but has adopted the proposed provisions as final. For purposes of establishing continuing eligibility for previously awarded long term contracts, recertification is required within 60 to 120 days prior to the end of the fifth year of the contract. 48 CFR § 52.219-28; 13 CFR § 121.404(g)(3). However, this requirement is distinct from the annual recertification requirements in the proposed rule. The annual recertification requirement

contemplated in the proposed rule is for purposes of being considered for award of future contracts. Such a requirement already exists under 48 CFR § 4.1201(b). Accordingly, SBA has not adopted this comment in the Final rule.

One commenter suggested that SBA provide notification and an opportunity for business concerns to comply with the annual certification requirement. SBA does not believe such notification is necessary given that concerns are already required to certify their size and status annually under 48 CFR § 4.1201(b). Further, SBA lacks the statutory authority to implement such a notification system. Accordingly, SBA has not adopted this comment in the Final rule.

Another commenter suggested that SBA issue additional guidance to clarify the annual certification requirement as applied to business concerns operating in industries with a revenue-based size standard. This commenter expressed concern that an annual certification requirement would not take into consideration revenue fluctuations common to many small business concerns. SBA disagrees. At any given time, a firm's size may be determined under a revenue-based size standard by dividing the sum of firm's annual receipts from the past three completed fiscal years by three. 13 CFR § 121.104(c). This method is specifically designed to account for revenue fluctuations and SBA does not believe the annual recertification requirement has any implications specific to those firms operating in industries with revenue-based size standards.

Another commenter suggested that the annual recertification requirement be applied to 8(a) Business Development and HUBZone program participants. As noted in the proposed rule, SBA did not impose the recertification requirement for these programs because SBA is responsible for providing certification designations in federal

procurement databases for these programs. Therefore, SBA has not adopted this comment in the final rule.

#### Other Comments

One commenter recommended that SBA provide clarification as to the rule's application to misrepresentations by subcontractors. It is SBA's intent that the presumption of loss shall apply to subcontractors who willfully misrepresent their size or status in order to receive a subcontract award. Accordingly, proposed §§ 121.108(a), 121.411(d), 124.521(a), 124.1015(a), 125.29(a), 126.900(a), and 127.700(a) explicitly provided that a presumption of loss to the United States shall be imposed whenever it is established that a business concern willfully sought and received award of a subcontract by misrepresentation. SBA does not believe any additional clarification is necessary. The same commenter also requested clarification of the prime contractor's liability when a subcontractor misrepresents its status to the prime contractor. Pursuant to 48 CFR § 19.703(b), a prime contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's small business size or status. When read in conjunction with the final rule, SBA believes this insulates prime contractors acting in good faith from liability for misrepresentations made by their subcontractors. In response to this comment, SBA has clarified this point in the limitation of liability sections of the Final rule.

One commenter suggested that SBA provide clarification as to a contracting officer's duty to stop work on a contract if it becomes clear that the awardee misrepresented its status before completion of the contract. Under SBA's existing regulations, contracting officers have the authority to file a size protest at any time, even

after award. 13 CFR §§ 121.1004(b), 124.1010(c)(1)(iii), 125.25(d)(3), 126.801(d)(3), and 127.603(c)(3). SBA's regulations also address the effect of a negative eligibility determination on the procurement in question. 13 CFR §§ 121.1009(g), 124.1013(h), 125.27(g), 126.803(d), and 127.604(f).

Another commenter suggested that SBA amend its regulations to impose suspension and debarment only when misrepresentation resulted in actual award. SBA does not believe that receipt of an award should be a prerequisite for debarment, suspension or any other penalty outlined in the Small Business Act or SBA's regulations. Firms have an obligation to accurately represent their size and/or status. Any fraudulent misrepresentation which inhibits the government's ability to rely on future statements made by the contractor should be subject to possible suspension and debarment actions. Accordingly this comment has not been adopted in the final rule. However, for clarity and accuracy, the title "debarring official" has been changed to "suspension and debarment official" in 13 CFR §§ 121.108(e)(1), 121.411(h)(1), 124.1015(e)(1), 125.29(e)(1), 126.900(e)(1), and 127.700(e)(1).

One commenter recommended that ORCA/SAM be modified to require the contractor to make an affirmative acknowledgment that the software interface correctly determined the business's size. Proposed §§ 121.108(c), 121.411(f), 124.521(c), 124.1015(c), 125.29(c), 126.900(c), 127.700(c) require an authorized official to sign the small business size and status certification page of any solicitation. SBA does not believe any additional clarification or changes to the proposed rule are necessary and adopts the provisions in the Final rule as proposed.

Another commenter suggested that SBA address situations where a firm claims to

be small under its primary NAICS code and submits an offer on a procurement issued under a different NAICS code with a more restrictive size standard. SBA believes its regulations are clear on this point. 13 CFR § 121.402(a) provides that "a concern must not exceed the size standard for the NAICS code specified in the solicitation," and 13 CFR § 121.405(a) further provides that "a concern must self-certify it is small under the size standard specified in the solicitation." As such, SBA has not made additional changes to the rule in response to this comment.

One commenter recommended the creation of an IRS portal through which relevant parties may look up a business's tax returns for purposes of determining size. Tax returns are not public documents and SBA lacks the statutory authority to implement such a system.

One commenter proposed that footnote 18 to 13 CFR § 121.201 be applied to all value-added resellers. The proposed rule did not address specific size standards and, therefore, this comment is beyond the scope of the proposed rulemaking.

Another commenter suggested that SBA eliminate all programs based on sex, race or minority status. The proposed rule did not address the elimination of any SBA programs and, therefore, this comment is beyond the scope of the proposed rulemaking.

Compliance with Executive Orders 12866, 13563, 12988, 13132, 13272, the Paperwork Reduction Act (44 U.S.C., Chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)

#### Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for purposes of Executive Order 12866. In the proposed rule, SBA set forth its initial regulatory impact analysis, which addressed the following:

Necessity of the regulation; the potential benefits and costs of the regulation; and alternative approaches to the proposed rule. SBA did not receive any comments which specifically addressed this regulatory impact analysis. Therefore, SBA adopts as final its initial regulatory impact analysis.

#### Executive Order 13563

This final rule implements important statutory provisions intended to prevent and deter fraud and misrepresentation in small business government contracting and other programs. SBA has amended all applicable Parts of its regulations to put participants in those programs on notice of the penalties associated with misrepresentation, and to the extent practicable, utilized identical language in each Part. SBA has also included in each Part other relevant applicable statutory provisions concerning the penalties for misrepresentation. The costs associated with these rules, requiring a signature in connection with a size or status representation and requiring concerns to update online certifications annually, are minimal and required by statute. As part of its implementation of this executive order and consistent with its commitment to public participation in the rulemaking process, SBA held public forums around the country to discuss implementation of the Jobs Act, including the provisions in this rule.

#### Executive Order 12988

For the purpose of Executive Order 12988, this final rule meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

#### Executive Order 13132



This final rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government, as specified in the order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act, 44 U.S.C., Ch. 35

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this rule does not impose new reporting requirements and does not require new recordkeeping requirements. In accordance with 48 CFR §§ 4.1202, 52.204-8, 52.219-1 and 13 CFR §§ 121.404(a), 121.411, concerns must submit paper or electronic representations or certifications in connection with prime contracts and subcontracts. The Jobs Act requires that each offeror or applicant for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant. The Jobs Act mandates that an authorized official must sign the certification on the same page containing the size and status claimed by the concern. Offerors are already required to sign their offers, bids or quotes (Standard Forms 18, 33, and 1449), so this provision does not create new reporting or recordkeeping requirements.

Regulatory Flexibility Act

SBA has determined that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Accordingly, SBA set forth an Initial Regulatory Flexibility Act (IRFA) analysis in the proposed rule. The IRFA addressed the impact of the

proposed rule in accordance with 5 U.S.C. 603. The IRFA examined the objectives and legal basis for the proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there were any Federal rules that may duplicate, overlap, or conflict with the proposed rule; and whether there were any significant alternatives to the proposed rule. The Agency's final regulatory flexibility analysis (FRFA) is set forth below.

(a) Need for, Objectives, and Legal Basis of the Rule

These regulatory amendments implement Sections 1341 and 1342 of the Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504, September 27, 2010 (Jobs Act); 15 U.S.C. §§ 632(w), (x). The purpose of the statute and implementing regulations is to prevent or deter firms from misrepresenting their size or socioeconomic status.

(b) Estimate of the Number of Small Entities to Which the Rule Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of entities that may be affected by the proposed rules, if adopted. The RFA defines "small entity" to include "small businesses," "small organizations," and "small governmental jurisdictions." SBA's programs do not apply to "small organizations" or "small governmental jurisdictions" because they are non-profit or governmental entities and do not generally qualify as "business concerns" within the meaning of SBA's regulations. SBA's programs generally apply only to for-profit business concerns. Therefore, the regulation will not impact small organizations or small governmental jurisdictions.

In fiscal year 2010, there were approximately 1.6 million small business contract actions (out of 3.36 million total small business eligible contract actions). This final rule's presumption of loss will only impact small business concerns that misrepresent their size or status in connection with a contract, subcontract, cooperative agreement, cooperative research and development agreement or grant in such a way that criminal prosecution or other action is taken by the Government in order to redress the misrepresentation. In fiscal year 2010, SBA found approximately 200 firms to be ineligible for a contract (14 HUBZone, 33 Service-Disabled Veteran-Owned, 0 Women-Owned Small Business, 151 size). Not all of these firms would be criminally prosecuted or have others actions taken against them. Thus, the regulations concerning presumption of loss will impact very few concerns, and some of these concerns are not actually small.

There are in approximately 348,000 concerns listed as small business concerns in the Dynamic Small Business Search (DSBS) database. The regulations concerning deemed certifications and the requirement for a signature apply to all of these concerns, to the extent the concerns submit an offer for a prime contract that is set aside for small business concerns. In addition, there are small business concerns that are not registered in DSBS that submit offers or responses for grants, subcontracts, and other agreements. The annual certification requirement applies to all of the 348,000 firms registered in DSBS.

(c) Projected Reporting, Recordkeeping and Other Compliance Requirements.

This final rule does not impose a new information collection, recordkeeping or compliance requirement on small businesses. A firm's size or socioeconomic status is generally based on records that it already possesses, such as payroll records and annual

tax returns. Firms currently must represent their size or status in connection with contracts and subcontracts, either electronically or in paper form. 48 CFR §§ 4.1202, 52.204-8, 52.219-1 and 13 CFR §§ 121.404(a), 121.411. The rule requires an authorized official to sign on the page containing a concern's size or status representation. Offerors are already required to sign their offers, so the burden on small business concerns to also sign their size or status representation or certification is minimal. Standard Forms 18, 33, 1447 and 1449.

(d) Federal Rules Which May Duplicate, Overlap or Conflict with the Rule

Section 1342 of the Jobs Act requires that firms that fail to meet the annual certification or representation requirement shall lose their status in the database. Firms will not be able submit offers for small business contracts based on their online representations or certifications (48 CFR § 4.1201(c)), but instead must have an authorized official sign in connection with the firm's size or status. Firms must already sign offers, so the impact will be negligible. Standard Forms 18, 33, 1447 and 1449.

(e) Steps Taken to Minimize Impact on Small Entities

This final rule implements Sections 1341 and 1342 of the Jobs Act. The final rule is directed at small business concerns seeking government contracts, subcontracts, grants, and cooperative agreements. The final rule is intended to prevent or deter firms from misrepresenting their size or socioeconomic status. The impact on firms that accurately represent their size or status will be minimal. An authorized official will have to sign an offer where the firm represents its size and status, but authorized officials are currently required to sign offers. Firms will have to update their size and socioeconomic status in ORCA/SAM at least annually, but that too is already required. 48 CFR § 4.1201(b)(1).

(f) Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis and the Agency's Assessment

The SBA received one comment that addressed the IRFA or the subjects discussed in the IRFA. This commenter expressed concern regarding a portion of the IRFA which read: "The proposed regulations concerning presumption of loss will only impact small business concerns that misrepresent their size or status in connection with a contract, subcontract, cooperative agreement, cooperative research and development agreement or grant in such a way that criminal prosecution or other action is taken by the Government." Specifically, the commenter felt that SBA's reference to "other action" requires clarification. As noted above, it is SBA's intent that the presumption of loss shall be applied in all manner of criminal, civil, administrative, contractual, common law, or other actions, which the United States government may take to redress willful misrepresentation. In fiscal year 2010, SBA found approximately 200 firms to be ineligible for a contract (14 HUBZone, 33 Service-Disabled Veteran-Owned, 0 Women-Owned Small Business, 151 size). Not all of these firms willfully misrepresented their size or status. Thus, SBA continues to believe that the regulations concerning presumption of loss will impact very few concerns, most of which will not qualify as small.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Reporting and recordkeeping requirements, and Small Businesses.

13 CFR Part 124

Administrative practice and procedure, Minority businesses, Reporting and recordkeeping requirements, and Technical assistance.

13 CFR Part 125

Government contracts, Reporting and recordkeeping requirements, Small businesses, and Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Penalties, Reporting and recordkeeping requirements and Small businesses.

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, and Small businesses.

For the reasons stated in the preamble, SBA amends parts 121, 124, 125, 126 and 127 of title 13 of the Code of Federal Regulations as follows:

PART 121 – SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644 and 662(5); and Pub. L. 105-135, sec. 401 et seq., 111 Stat. 2592.

2. Revise § 121.108 to read as follows:

§ 121.108 What are the requirements for representing small business size status, and what are the penalties for misrepresentation?

(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the

total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(b) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of small business size and status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.

(c) Signature Requirement. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the size status claimed by the concern.

(d) Limitation of Liability. Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size. Relevant factors to consider in making this determination may include the firm's internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as small without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) Penalties for Misrepresentation.

(1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.



(3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

3. Add new § 121.109 to read as follows:

§ 121.109 What must a concern do in order to be identified as a small business concern in any Federal procurement databases?

(a) In order to be identified as a small business concern in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its size in connection with specific size standards at least annually.

(b) If a firm identified as a small business concern in SAM fails to certify its size within one year of a size certification, the firm will not be listed as a small business concern in SAM, unless and until the firm recertifies its size.

§ 121.404 [Amended]

4. Amend § 121.404(b) by removing "and the date of certification by SBA" and adding in its place "and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification."

5. Amend § 121.411 by adding new paragraphs (d) through (i) to read as follows:

§ 121.411 What are the size procedures for SBA's section 8(d) Subcontracting Program?

\* \* \* \* \*

(d) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(e) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of small business size and status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.

(f) Signature Requirement. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the size status claimed by the concern.

(g) Limitation of Liability. Paragraphs (d) through (f) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size. Relevant factors to consider in making this determination may include the firm's internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as small without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(h) Penalties for Misrepresentation.

(1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for

misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.

(3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

6. Revise paragraph (f) of § 121.1009 to read as follows:

§ 121.1009 What are the procedures for making size determinations?

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(f) Notification of determination. SBA will promptly notify the contracting officer, the protester, and the protested concern. SBA will send the notification by verifiable means, which may include facsimile, electronic mail, or overnight delivery service.

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PART 124 – 8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED  
BUSINESS STATUS DETERMINATIONS

7. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815..

8. Add new § 124.521 to read as follows:

§ 124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to 8(a) Participants, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than an 8(a) Participant willfully sought and received the award by misrepresentation.

(b) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of 8(a) status:

(1) Submission of a bid or proposal for an 8(a) sole source or competitive contract.

(2) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small disadvantaged business (SDB).

(c) Signature Requirement. Each offer for an 8(a) contract shall contain a certification concerning the 8(a) status of a business concern seeking the contract. An authorized official must sign the certification on the same page containing the 8(a) status claimed by the concern.

(d) Limitation of Liability. Paragraphs (a) – (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of 8(a) status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' 8(a) status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing representation or certification as an eligible 8(a) Participant, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as an eligible 8(a) Participant without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

9. Add new § 124.1015 to read as follows:

§ 124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?

(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or

grant which is set aside, reserved, or otherwise classified as intended for award to SDB concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a SDB willfully sought and received the award by misrepresentation.

(b) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of SDB status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to SDBs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a SDB.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a SDB.

(c) Signature Requirement. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the SDB status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the SDB status claimed by the concern.

(d) Limitation of Liability. Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of SDB status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' SDB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing SDB status representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as a SDB without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) Penalties for Misrepresentation.

(1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a SDB pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.



(3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the SDB status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

10. Add new § 124.1016 to read as follows:

§ 124.1016 What must a concern do in order to be identified as a SDB in any Federal procurement database?

(a) In order to be identified as a SDB in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its SDB status in connection with specific eligibility requirements at least annually.

(b) If a firm identified as a SDB in SAM fails to certify its status within one year of a status certification, the firm will not be listed as a SDB in SAM, unless and until the firm recertifies its SDB status.

## PART 125 – GOVERNMENT CONTRACTING PROGRAMS

11. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637, 644 and 657f.

12. Revise § 125.29 to read as follows:

§ 125.29 What are the requirements for representing SDVO SBC status, and what are the penalties for misrepresentation?

(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to SDVO SBCs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a SDVO SBC willfully sought and received the award by misrepresentation.

(b) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of SDVO SBC status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to SDVO SBCs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a SDVO SBC.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a SDVO SBC.

(c) Signature Requirement. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the SDVO SBC status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the SDVO SBC status claimed by the concern.

(d) Limitation of Liability. Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of SDVO SBC status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' SDVO SBC status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing SDVO SBC status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as a SDVO SBC without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) Penalties for Misrepresentation.

(1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for

misrepresenting a firm's status as a SDVO SBC pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.

(3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the SDVO SBC status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

13. Add new § 125.30 to read as follows:

§ 125.30 What must a concern do in order to be identified as a SDVO SBC in any Federal procurement databases?

(a) In order to be identified as a SDVO SBC in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its SDVO SBC status in connection with specific eligibility requirements at least annually.

(b) If a firm identified as a SDVO SBC in SAM fails to certify its status within one year of a status certification, the firm will not be listed as a SDVO SBC in SAM, unless and until the firm recertifies its SDVO SBC status.

PART 126 --HUBZONE PROGRAM

14. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p) and 657a.

15. Revise § 126.900 to read as follows:

§ 126.900 What are the requirements for representing HUBZone status, and what are the penalties for misrepresentation?

(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to HUBZone SBCs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a HUBZone SBC willfully sought and received the award by misrepresentation.

(b) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of HUBZone SBC status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to HUBZone SBCs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development

agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a HUBZone SBC.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a HUBZone SBC.

(c) Signature Requirement. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the HUBZone SBC status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the HUBZone status claimed by the concern.

(d) Limitation of Liability. Paragraphs (a) – (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of HUBZone status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' HUBZone status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing HUBZone status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as a HUBZone SBC without any

representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) Penalties for Misrepresentation.

(1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a HUBZone SBC pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.

(3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the HUBZone status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

PART 127 – WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT  
PROGRAM

16. The authority citation for part 127 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

17. Revise § 127.700 to read as follows:

§ 127.700 What are the requirements for representing EDWOSB or WOSB status, and what are the penalties for misrepresentation?

(a) Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to EDWOSBs or WOSBs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a EDWOSB or WOSB willfully sought and received the award by misrepresentation.

(b) Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of EDWOSB or WOSB status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to EDWOSBs or WOSBs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a EDWOSB or WOSB.



(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as an EDWOSB or WOSB.

(c) Signature Requirement. Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the EDWOSB or WOSB status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the EDWOSB or WOSB status claimed by the concern.

(d) Limitation of Liability. Paragraphs (a) – (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of EDWOSB or WOSB status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' EDWOSB or WOSB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing EDWOSB or WOSB status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as an EDWOSB or WOSB without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) Penalties for Misrepresentation.

(1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as an EDWOSB or WOSB pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801-3812, and any other applicable laws.

(3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the EDWOSB or WOSB status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct "continuing representations" that are no longer true.

18. Add new § 127.701 to read as follows:

§ 127.701 What must a concern do in order to be identified as an EDWOSB or WOSB in any Federal procurement databases?

(a) In order to be identified as an EDWOSB or WOSB in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its EDWOSB or WOSB status in connection with specific eligibility requirements at least annually.

(b) If a firm identified as an EDWOSB or WOSB in SAM fails to certify its status within one year of a status certification, the firm will not be listed as an EDWOSB or WOSB in SAM, unless and until the firm recertifies its EDWOSB or WOSB status.

Karen G. Mills,  
Administrator.

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